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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

**IN RE: MIDLAND CREDIT  
MANAGEMENT, INC., TELEPHONE  
CONSUMER PROTECTION ACT  
LITIGATION**

CASE NO. 11-md-2286-MMA (MDD)  
Member cases: 16-cv-02786; 16-cv-01041

**JOINT MOTION OF PARTIES'  
PROPOSED ADDITIONAL  
DEPOSITION AND DISCOVERY PLAN**

On September 4, 2019, the Court ordered the Parties to meet and confer with respect to Plaintiffs' proposed additional discovery requests and submit a Joint Proposed Additional Deposition and Discovery Plan. Pursuant to the Court's order, the parties submit the following Proposed Additional Deposition and Discovery Plan:

**A. Deposition of Alfred Collins**

1. Plaintiffs' Statement: Plaintiffs, including the Individual 14 Plaintiffs referenced in the Court's Order of September 4, 2019, intend to take the deposition, including a request for documents, of Alfred Collins ("Collins"). Alfred Collins is a former collection manager employee of Defendants who filed a whistleblower lawsuit against Defendants that alleged, among other things, that Defendants violated the TCPA with respect to placing collection calls to consumers during the relevant time period. *See, Alfred Collins v. Encore Capital Group, Inc., et al.* Case No. 37-2016-00007600-CU-WT-CTL, filed March 7, 2016 (Cal. San Diego Cnty. Super. Ct.), *writ of mandate to seal complaint denied by Encore Capital Group, Inc v. The Superior Court of San Diego County*, No. D070649 (Cal. Ct. App. July 07, 2016) (unpubl.). *See* attached Complaint and Writ. The Parties agree that any depositions of Collins must be taken within three months from the date that the Court issues its Order regarding the Joint Third-Party Discovery Plan.

Defendants provided their proposed statement regarding Collins on the day that this joint motion must be filed, significantly handicapping Plaintiffs from having sufficient time to respond to Defendants' statements in this motion. Plaintiffs therefore suggest that any limitations on the deposition be more fully discussed, and possibly ruled upon, at the proposed telephone status conference on or around January 8, 2020 (*see infra* at 8). Plaintiffs disagree with, and object to, Defendant's prejudicial characterizations of Collins and his complaint. The purpose of this document is to address scheduling, and most of Defendants' arguments about Collins are ultimately questions of fact addressing a witness's credibility. Plaintiffs further object to Defendants' proposed

1 limitations on Plaintiffs' deposition of Collins. Briefly addressing Defendants' enumerated points  
 2 *infra* at 5-6: 1) Defendants may object to questions regarding "communications with attorneys  
 3 representing Midland" at the deposition, and not all such communications are privileged (for  
 4 example, if non-attorneys were present, the crime-fraud exception, and/or other waiver of  
 5 privilege); 2) Defendants should not be the sole arbiter of whether documents are "stolen" or  
 6 privileged. Plaintiffs propose that Collins should produce documents pursuant to subpoena to  
 7 Plaintiffs' counsel, who will subsequently share those documents with Defendants' counsel, and  
 8 any issues with privilege may be addressed by the parties and the Court. Alternatively, Plaintiffs  
 9 propose that a Special Master review the documents and make the determination whether privilege  
 10 applies, create a privilege log, and provide the parties the opportunity to object to the determination;  
 11 3) Defendants have no grounds to insist that only one Plaintiff's attorney attend Collins deposition.  
 12 Any material that is actually privileged can be stricken from the record. As the writ Defendants  
 13 mentioned in their statement was denied by the court, there is little likelihood that any privileged  
 14 information in Collins deposition would actually lead to disqualification; 4) Plaintiff's object to  
 15 limiting their deposition time to 3.5 hours, but generally do not object to Defendants having equal  
 16 time to question Collins in the deposition, or to allowing Midland to depose Collins separately; and  
 17 5) rather than tying up Judge Dembin's schedule for one or two days, Plaintiffs suggest that the  
 18 Parties follow Judge Dembin's Chambers Rules, § V(B) regarding "Disputes During Depositions."  
 19 Plaintiffs' counsel would not object to attempting to schedule the deposition on a date in which  
 20 Judge Dembin will likely be available by telephone, after consulting with his chambers.  
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25       2.       Defendants' Statement: Alfred Collins is not a "whistleblower." He is a disgruntled  
 26 former Midland employee who stole attorney-client privileged communications and attorney work  
 27 product when he left the company in March 2015. The documents he stole included legal memos  
 28

1 advising on TCPA issues from the attorneys representing Midland in this MDL. After Collins left  
2 Midland, he publicly filed a wrongful termination complaint that *quoted* the stolen, privileged  
3 memos (*e.g.*, Collins Cplt., ¶¶ 72, 85) and also purported to describe privileged conversations he  
4 supposedly had with Midland’s in-house attorneys and outside counsel about the Company’s TCPA  
5 compliance efforts. *See, e.g., id.*, ¶¶ 25, 27, 28, 72, 77, 85, 90.

6 Collins is neither a lawyer nor a technology expert. He was a mid-level employee involved in  
7 coordinating a project led by Midland’s in-house attorneys in response to the TCPA class actions that  
8 originally comprised this MDL. His lawsuit against Midland alleged a highly improbable conspiracy  
9 in which Midland’s in-house lawyers supposedly orchestrated a convoluted scheme to “fake” TCPA  
10 compliance through various means. His allegations are false—as are his descriptions of conversations  
11 he supposedly had with Midland’s in-house and outside attorneys.

13 Plaintiffs have already deposed Midland’s F.R.C.P. 30(b)(6) witness about the company’s  
14 dialing technology during the putative class period. Their decision to rely on Collins signals  
15 desperation more than anything else. Nevertheless, Midland does not object to Plaintiff’s request to  
16 depose Collins, provided that (1) at least one half of the seven-hour deposition time is allotted to  
17 Midland so that it may question Collins as well; and (2) the deposition is limited to non-privileged  
18 facts and does not include questions about privileged communications or attorney work product.  
19 Midland also requests that the Court issue an order putting procedures in place to ensure that this  
20 deposition does not result in the disclosure of Midland’s privileged communications, as detailed  
21 further below.

23 To be absolutely clear, Midland does not waive, and has not waived, the privilege with respect  
24 to this MDL, any case in it, its TCPA compliance procedures, or any other matters plaintiffs may  
25 attempt to raise at Collins’ deposition. Midland did everything it could to keep its privileged  
26 information from being disclosed—Collins was bound by a confidentiality agreement which he  
27

1 ignored; Midland brought an emergency motion to seal his complaint when it was filed; Midland took  
2 a writ when the motion to seal was denied. Collins' unauthorized disclosure of privileged information  
3 does not effect a waiver or otherwise make Midland's attorney-client communications and work  
4 product fair game in this MDL. *See Dukes v. Wal-Mart Stores*, 2013 WL 1282892, at \*4-5 (N.D. Cal.  
5 Mar. 26, 2013) (collecting numerous cases that holding that the unauthorized disclosure of privileged  
6 materials does not effect a waiver).

7  
8 Good cause exists for the Court to limit the Collins deposition on the front end so as to protect  
9 the privilege. First, this is not the typical case where objections and instructions not to answer would  
10 be sufficient to protect the privilege. Collins is hostile to Midland and has already demonstrated that  
11 he has no compunction about disseminating Midland's privileged information. He is unlikely to  
12 comply with instructions from Midland's counsel not to disclose privileged information. Second,  
13 dealing with the fallout of the Collins deposition after the fact, through motions to seal testimony and  
14 to disqualify counsel who were exposed to privileged information through Collins' deposition, will  
15 derail this MDL. *See, e.g., Bona Fide Conglomerate, Inc. v. Sourceamerica*, 2016 WL 4361808 at  
16 \*11-12 (S.D. Cal. Aug. 12, 2016) (disqualifying counsel who obtained and used opponent's privileged  
17 information); *McDermott Will & Emery LLP v. Sup.Ct. (Hausman)* 10 Cal. App. 5th 1083, 1120-1122  
18 (2017) (same); *Clark v. Superior Court*, 196 Cal. App. 4th 37, 52-55 (2011) (affirming  
19 disqualification of counsel who "excessively reviewed" privileged documents stolen by the  
20 defendant's former employee).

21  
22 Accordingly, Midland requests that the Court set the following rules and limitations on  
23 Collins' deposition:  
24

- 25 1. Plaintiffs may not ask Collins about any communications with attorneys representing  
26 Midland, including both in-house and outside counsel.

- 1 2. If plaintiffs wish to request documents in their subpoena, the subpoena must direct Collins  
2 to deliver the documents to a deposition officer who will only be authorized to release the  
3 documents to Midland. This will prevent the disclosure of any stolen, privileged  
4 documents Collins still has in his possession.<sup>1</sup> Any privileged documents produced by  
5 Collins will be destroyed, and any confidential Midland documents will be designated as  
6 such pursuant to the Protective Order. Once these steps are complete, plaintiffs who have  
7 signed the Protective Order may then access Collins' production.  
8
- 9 3. Only one attorney for plaintiffs may attend Collins' deposition. No other plaintiff's  
10 counsel may attend or listen to the deposition in real time. In the event that Collins  
11 discloses privileged information during the deposition, this rule will avoid putting more  
12 than one plaintiff's counsel in a position where they would be subject to disqualification.  
13 Once the deposition is complete, Midland will have the opportunity to redact any  
14 privileged material from the transcript. At that point, plaintiffs who have signed on to the  
15 protective order may obtain a redacted copy of the transcript.  
16
- 17 4. The seven-hour deposition time shall be shared equally between one attorney representing  
18 all plaintiffs and counsel representing Midland. If plaintiffs exceed their allotted time, then  
19 Midland shall be entitled to an equal amount of additional time (i.e., if plaintiffs take five  
20 hours, then Midland is entitled to five hours notwithstanding Rule 30 (d)(1)).  
21
- 22 5. If the Court is amenable, Midland believes it would be beneficial for the deposition to be  
23 conducted before Judge Dembin, so that any privilege issues can be immediately ruled  
24 upon.  
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27 <sup>1</sup> Collins should not have any such documents, since his settlement agreement with Midland required him to  
28 return or destroy all of the documents he stole.

1 Plaintiffs have suggested that any proposed limitations on the Collins deposition be  
 2 discussed at a status conference on or around January 8, 2020.<sup>2</sup> Midland agrees that this would make  
 3 sense, especially since it is apparent from Plaintiffs' response to Midland's proposal that if these  
 4 issues are not addressed on the front end, disputes arising from the Collins deposition will likely  
 5 derail this MDL and delay resolution on the merits.

6 **B. 30(b)(6) Deposition regarding calling technologies and practices for calls made**  
 7 **prior to September 1, 2014.**

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- 9 1. Plaintiffs' Position: The Individual 14 Plaintiffs referenced in the Court's Order of  
 10 September 4, 2019 have conferred and agree that, to the extent the Individual 14  
 11 Plaintiffs desire to depose Defendants corporate representative regarding calling  
 12 technologies and practices for calls made prior to September 1, 2014, the Individual  
 13 Plaintiffs shall take such depositions, if needed, after the conclusion of the MDL.
- 14 2. Defendants' Position: Defendants have no objection to deferring depositions on calling  
 15 technologies and practices for calls made prior to September 1, 2014 until after the  
 16 conclusion of the MDL.

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18 **C. Deposition of Noble**

- 19 1. Plaintiffs intend to take the deposition, including a request for documents, of Noble  
 20 Systems Corporation ("Noble"). Noble developed and marketed the technology that  
 21 Defendants used to placing collection calls to Plaintiffs and other consumers during the  
 22 relevant time period. This discovery will pertain to the technological capabilities of the  
 23 collection software utilized by the Defendants. This discovery is necessary for  
 24 establishing whether the system used by the defendants is an automatic telephone dialing  
 25

26

27 <sup>2</sup> Midland's counsel is scheduled to be in a mandatory settlement conference with Magistrate Judge Brooks on  
 28 January 8, 2020 beginning at 10:00 am, but is otherwise available the weeks of January 6 and January 13.

1 system. The Parties agree that any depositions of Noble must be taken within three  
 2 months from the date that the Court issues its Order regarding the Joint Motion for  
 3 Additional Depositions and Discovery Plan.

- 4 2. Defendants Position: Defendants do not object to plaintiffs' proposal.

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 6 **D. Scheduling Matters.**

- 7  
 8 1. Plaintiffs' Position: The Plaintiffs respectfully request that the Court enter its order  
 9 regarding the Parties' Joint Motion for Additional Depositions and Discovery Plan  
 10 before entering any order with respect to Plaintiff's forthcoming Motion for Class  
 11 Certification and/or Defendants' forthcoming Motion for Partial Summary Judgment so  
 12 that the Parties may incorporate the relevant information discovered through third-party  
 13 discovery. The Plaintiffs further request that the Court schedule a telephonic  
 14 status/scheduling conference on or around January 10, 2020, to address further  
 15 scheduling matters, including expert discovery and the continuance of Plaintiffs'  
 16 forthcoming Motion for Class Certification and Defendants' forthcoming Motion for  
 17 Partial Summary Judgment.  
 18

- 19 2. Defendants' Position: Defendants do not object to plaintiffs' proposal.

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 22 Respectfully submitted: December 6, 2019

23  
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 25 **ADEMI & O'REILLY, LLP**  
 26 By: /s/ John D. Blythin  
 27 Shpetim Ademi  
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**CERTIFICATE OF SERVICE**

I, John D. Blythin, hereby certify that a copy of the foregoing JOINT REPORT OF PARTIES' THIRD PARTY DISCOVERY PLAN and this Certificate of Service is being filed via this Court's CM/ECF system and served by First Class Mail and email on December 6, 2019, to the following: (if any)

/s/ John D. Blythin  
John D. Blythin